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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 77

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FRANK PARDEE, ANNA PARDEE, AND GIRARD TRUST COMPANY, trustees under the will of Calvin Pardee

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23) is reported in 23 B.T.A. 846. The opinion of the Circuit Court of Appeals (R. 34) is reported in 63 F. (2d) 948.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 4, 1933. (R. 36.) The petition for a writ of certiorari was filed May 17, 1933, and was granted May 29, 1933. (R. 38.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the testator's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 6-7.

STATEMENT

The facts found by the Board of Tax Appeals (R. 23) are not controverted and may be summarized as follows:

Calvin Pardee died, a resident of Pennsylvania, on March 18, 1923. By his will he disposed of his personal belongings and left a life estate to his wife in his residence. He then provided (R. 24):

> Third: I also give unto my said wife an annuity of * * * $50,000, to be computed from the date of my decease and to be paid in advance in quarterly payments.

Provision was made for the disposition of the surplus income and of the corpus of the estate after the widow's death.

The amounts thus paid to the widow by the respondents in 1924 and 1925, the tax years here involved, together with payments in previous years, did not aggregate the value of the interest to which she would have been entitled had she taken against the will.

In computing the taxable income of the estate for the years involved the respondents deducted from gross income the amounts distributed to the widow. The Commissioner disallowed the deduction thus claimed and asserted a deficiency accordingly. This action was sustained by the Board of Tax Appeals. The court below reversed the Board, one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income as such and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by testamentary trustees to a widow who has elected to take under the will, is deductible by the trustees although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondents to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

ARGUMENT

This case presents the question which is discussed in Point II of the Government's brief in *Commissioner* v. *Butterworth*, pending before this

Court as No. 75, October Term, 1933. The Court is respectfully referred to the argument and authorities there presented.

In the *Butterworth case* the widow was entitled to receive only the income from the trust, and it is argued in Point III of the brief that the widow should be held taxable on this income. In the present case the widow is entitled to receive an annuity, which is payable primarily out of income but apparently payable at all events whether from income or principal. If the proper construction of the will is that the annuity is payable out of principal if the income is insufficient, then it is settled by this Court's decision in *Burnet* v. *Whitehouse*, 283 U.S. 148, that the widow is not taxable on the payments. For this reason the argument advanced in Point III of the Government's brief in the *Butterworth case* may not be applicable here.

If the annuity in this case was payable at all events whether or not there should be sufficient income, then this Court's decision in the *Whitehouse case, supra*, would seem to make it plain that the amounts paid to the widow are not proper deductions under Section 219. This Court there said (p. 151):

> As held below, the bequest to Mrs. Whitehouse was not one to be paid from income but of a sum certain, payable at all events during each year so long as she should live. It would be an anomaly to tax the receipts for one year and exempt them for another simply because executors paid the first from in-

come received and the second out of the corpus. The will directed payment without reference to the existence or absence of income.

* * * * *

An attempt is made to strengthen the position of the Commissioner by reference to § 219, Act of 1921, which declares that the tax imposed by §§ 210 and 211 shall apply to the income of estates, including—"Income which is to be distributed to the beneficiaries periodically; * * *." *But clearly enough, we think, this section applies only to income paid as such to a beneficiary.* (Italics ours.)

Under this controlling construction of the statute we submit that Section 219 (b) (2) permits the deduction only of income required to be paid as such. Since the terms of the will do not so require, the claimed deductions must be denied.

CONCLUSION

The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

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OCTOBER 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct; * * *.

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the

amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year; * * *. (U.S.C., Title 26, Sec. 969.)

Section 219 (a) (2) and (b) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U.S.C. App., Title 26, Sec. 969), is identical with the corresponding provisions of the Revenue Act of 1924.

Purdon's Pennsylvania Statutes Annotated, Title 20, Decedents' and Trust Estates:

Sec. 31. *Widow's share in lieu of dower.*—The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seised; and her share in lands aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seised. * * * (1917, June 7, P.L. 429, §3.)

Sec. 261. *Spouse can elect to take against will.*—When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: * * *. (1917, June 7, P.L. 403, §23 [a].)

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